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Brf. of Campbell for D. E.

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Supreme Court of the United States.

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Plaintiffs in Error.

v.

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Defendant in Error.

In Error to the Supreme Court of the State of Mississippi.

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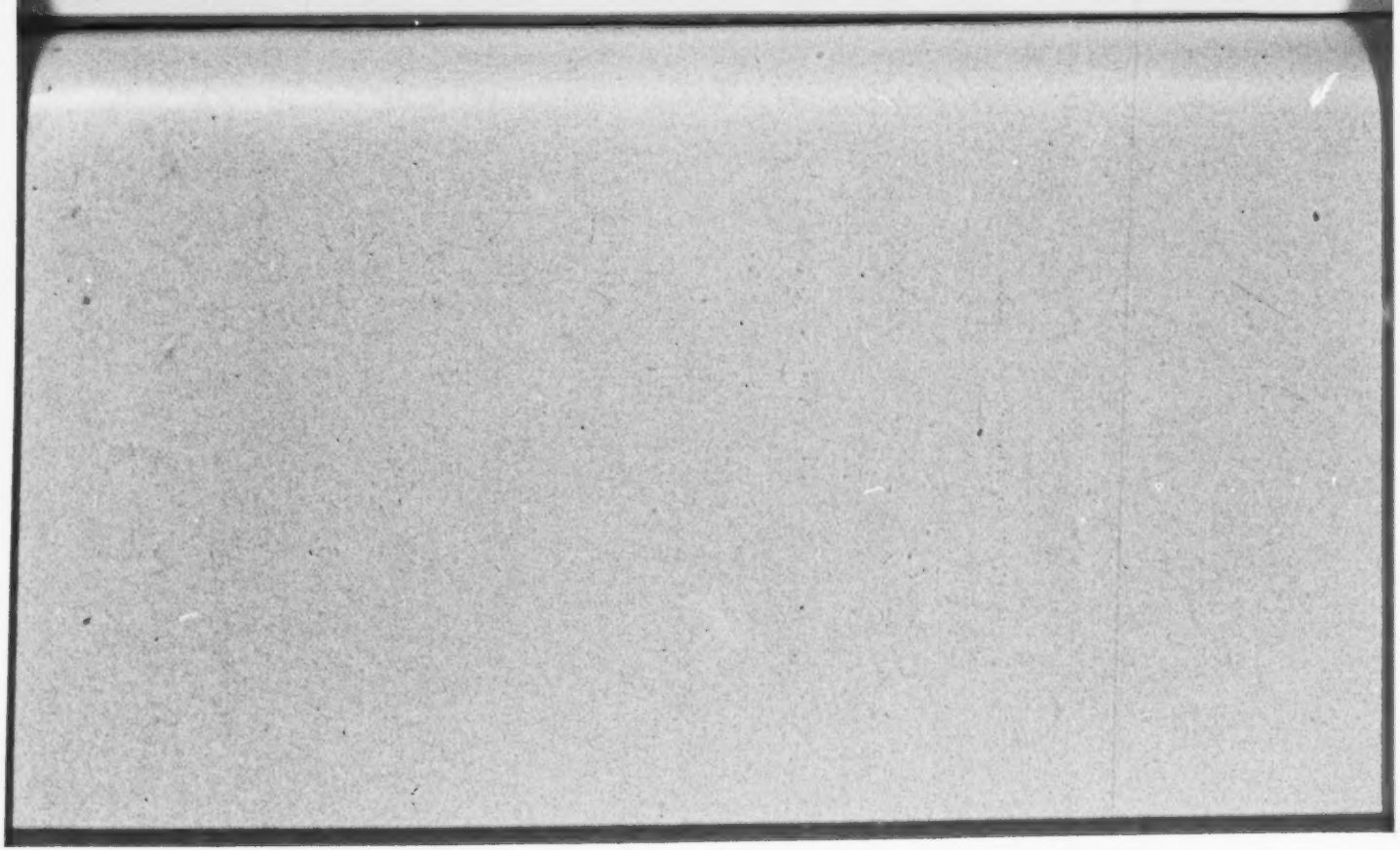

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STATEMENT OF THE CASE.

Wirt Adams, State Revenue Agent of Mississippi, sued the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company for taxes of the year 1892, and successive years, alleged to be due on the property of the Louisville, New Orleans & Texas Railroad Company. The first named was claimed to be liable, because of its consolidation with the Louisville, New Orleans & Texas Company, and the Illinois Central Railroad Company, because of its relation to the matter, as set forth in the declaration.

The two defendants filed a joint plea averring payment of all taxes assessed, by compliance with section 21 of the charter of the Mobile & Northwestern Railroad Company made part of the

charter of the Louisville, New Orleans & Texas Railroad Company, which was part of the Yazoo & Mississippi Valley Railroad Company, and denying liability on the ground of earnings. The Illinois Central Railroad Company pleaded separately denying that it had purchased the Louisville, New Orleans & Texas Company and property, or, had assumed liability for its taxes.

The first plea was demurred to. The demurrer was overruled, and fourteen replications were filed. These were all demurred to with varying success. Several issues of fact were joined, and they were tried by a jury with the result that a verdict was rendered for the plaintiff for the taxes of one year and for the defendants for the other years. From motions for a new trial made by both sides and overruled, both appealed to the Supreme Court, where errors were assigned by both. In the trial in the Circuit Court the plaintiff and defendants asked numerous instructions to the jury, some of which were given and many refused.

On these assignments of error the case was argued three times before the Supreme Court. On the 20th of June, 1898, it was decided, by reversing the judgment of the Circuit Court and granting a new trial. The announcement of the decision was accompanied by an opinion containing a summary of the views of the Court, showing the grounds of its conclusion. Chief of these is, that the consolidation of the Louisville, New Orleans & Texas Railroad Company and the Yazoo & Mississippi Valley Railroad Company, October 24th, 1892, caused the immunity from payment of taxes claimed, to be lost, by virtue of sections 180 and 181 of the Mississippi Constitution of 1890, operating on the act of the companies in consolidating. The companies had contended that the question at issue was *res judicata*, and the Court disposed of this adversely to them. In addition to this the Court declared that the act of the Legislature under which immunity from payment of taxes was claimed by the companies was prohibited by the Constitution of 1869, in force when the act was passed, and therefore that the immunity had never existed in legal contemplation.

When this decision was announced, counsel for the companies, pursuing the practice of the Court, presented a suggestion of

error, *i. e.*, a review and complaint of the opinion and holding of the Court. The judgment of the Supreme Court was rendered June 20, 1898, and the suggestion of error was presented June 27th. In this suggestion of error, the equivalent of an application for a re-argument or re-hearing, an effort was made among other things to interpose a federal question. *Not until then had there been a single objection, or suggestion, or intimation of this kind.* In the pleadings, objections to evidence, instructions for the jury, motions, assignment of errors, brief, argument, oral or written, there was never an allusion to a federal question as involved. On the contrary, it was contended by learned counsel for the companies that, if the Court should hold that the consolidation effected between the Yazoo & Mississippi Valley Railroad Company and the Louisville, New Orleans & Texas Railroad Company, October 24, 1892, was by virtue of sections 180 and 181 of the Constitution of 1890 a waiver of the exemption privilege conferred by section 5, Acts 1882, adopting section 21 of the charter of the Mobile & Northwestern Company, "it would terminate the controversy between the parties at once, and render all further considerations which have been mooted in this case superfluous." (p. 18, brief of Mayes & Harris, in Supreme Court of Mississippi). The case was staked on that. It was a question of State law. No other was thought of or suggested, and it was not until they had fought and lost on that, that they sought to shift their ground and introduce a new subject of controversy.

While the case was pending in the Supreme Court the revenue agent sued the same parties as before in the Circuit Court for the taxes of 1896 and 1897, and, when the case was remanded by the Supreme Court, an order of consolidation was made by consent by the Circuit Court for the trial of all the cases as one.

The Court in the summary of its views announced in deciding the case, June 20th, 1898, declared, it would thereafter furnish a more extended and elaborate view of its holdings, and soon after this decision it adjourned for the summer. The full opinion of the Court was not written until the kindly frosts had allayed apprehension of yellow fever, and the judges had assembled in Jackson. The term fixed for 2nd Monday of October was lost because of yellow fever, and a special term was begun

the 3rd Monday of November, when the full opinion was handed down. It re-affirmed what was in the summary, and elaborated it, and added other views not contained in it. A motion was made to strike this out, and was denied. The case had been retried in the Circuit Court, in pursuance of the reversal by the Supreme Court, and resulted in a verdict for the Revenue Agent, from judgment on which the companies appealed to the Supreme Court, where errors were assigned, and the case was heard thereon, and the judgment of the Circuit Court was affirmed. On this second trial in the Circuit Court and the Supreme Court, the reliance of the companies was on the federal questions attempted to be introduced into the case, for the first time, after the decision of the Supreme Court on the first appeal. There was nothing else except some questions of the practice of the State Courts in it; for all else had been decided against the companies, and the Circuit Court had followed the decision of the Supreme Court.

The federal question relied on by the companies, as set forth in their pleas, is the change of view by the Supreme Court, as to the interpretation of the Constitution of 1869 on the subject of temporary forbearance to tax railroad companies. The pleas stricken out by the Circuit Court, on the second trial of the case, merely amount to this, except wherein they deny some of the averments of the declaration, which denial is contained in former pleas not stricken out.

The certificate of the Chief Justice of the Supreme Court of Mississippi as to federal questions is untrue, except by confining it to what followed the decision of the Court. The record shows its falsity, as applied to the case before it was decided June 20, 1898, and I appeal to the record for the truth of my assertion.

ARGUMENT.

The claim of the Revenue Agent was, that the Yazoo & Mississippi Valley Railroad Company never had the immunity from taxes claimed, or if it had it, it was surrendered and lost by the act of consolidation, October 24, 1892, first, by the provisions of the charters involved, and secondly, by sections 180 and 181 of the Constitution of 1890, and that the matter was not *res judicata*. He also claimed that the earnings of the road were

and not raised in pleadings or evidence

sufficient to terminate the immunity. The contention of the companies was that the immunity had been possessed, and was not lost or surrendered, and that this was not an open question, having been adjudicated in favor of the contention of the companies, as was claimed.

This was the field of battle both in the Circuit and Supreme Courts. Neither party extended its lines beyond this. There was not even a feint beyond these well defined lines of operation. Within them all arguments were confined.

The view taken by the Court rendered unnecessary a deliverance as to the effect of the several charters or as to earnings; and the Court held that the consolidation, October 24, 1892, of the Louisville, New Orleans & Texas Railroad Company and of the Yazoo & Mississippi Valley Railroad Company caused the loss of the immunity claimed, if existent, by the operation of the Constitution of 1890, on this act, and that the matter was not *res judicata*. This might have properly ended the opinion, but it proceeded further, and thereby raised the clamor which succeeded, and is kept up here. With this, it is respectfully submitted, this Court has no concern. It comes too late, never having been raised until after the case was decided by the Supreme Court and an application for rehearing was made. A suggestion of error is an exact equivalent of an application for re-argument or re-hearing—a substitute for it—a means of communication between counsel and judges, *after decision*. The judgment or decree is entered, and this follows.

But, if it had been in time—if federal questions had been presented, at the outset, and had continued to be pressed and relied on, it would not avail, because of the rule of this Court not to review the decision of a state court resting on a question of state law, even, if a federal question is properly and in time presented by the record.

The early view of the Mississippi Court in Mississippi Mills v. Cook, 56 Miss. 40, decided in 1878, was that the constitution of 1869, Sec. 13, Art. XII, prohibited granting to corporations for pecuniary gain perpetual or irrepealable immunity or exemption from taxes, but permitted forbearance to tax, or the grant of temporary immunity to a general class with the right at any time to withdraw the grant.

The view of the State Supreme Court in this case is that that constitution prohibited and made void an irrepealable grant of exemption from taxes by special act to a special private corporation for pecuniary gain.

In this view the Supreme Court of the United States agrees, as shown by its utterances with reference to language similar to that contained in the constitution of Mississippi.

If this view is to prevail, the grant of exemption claimed was void *ab initio*. If the earlier prevails, the company held the right of exemption subject to repeal at the will of the State.

Concede that the Supreme Court will judge for itself independently, if there was a contract. Grant that there was a contract for exemption from taxes, as claimed by the other side, it was unauthorized and void, by the late view of the Supreme Court of Mississippi, and of this Court, from the beginning; and according to the early Mississippi view, it was lawful and valid, until it was lost, in accordance with the will of the State; and the Mississippi Court has held, it was lost *by the act of the company*, according to the will of the State as expressed in her constitution of 1890.

The Louisville, New Orleans & Texas Company came into being with full knowledge that the exemption claimed was subject to recall by the State, or to any regulation by the State, which might cause a loss of it to result.

It was certainly for the Mississippi Court to say what its Constitution and Statute meant, and it announced in 1878, before the Louisville, New Orleans & Texas Railway Company came into being, the extent of legislative power on this subject, and in 70 Miss. 779, it specifically declared that the appropriation of its taxes to its use could be nothing but an exemption from taxation. Plainly this is true, for paying is the burden of taxation, and to allow payment by swearing, as prescribed, was but an evasive form of exemption from taxation. What signifies the most exorbitant assessment for taxation, if payment is not required, or if the sum goes to the party's own use? Grant that the Legislature might have appropriated to the Company the money derived from its taxation, after it came into the treasury, it did not do this, but exempted the Company *from paying* any money into the treasury or to the collector, and freed it from the

obligation to pay, and nothing can be made of this but an exemption. If it was a violation of the constitution to free private corporations for pecuniary gain from the burden of taxation imposed on individuals, it matters not what form the exemption took, whether a direct exemption in terms or an evasive one in the shape of an appropriation—appropriation before collection, *i. e.*, release from payment or freedom from the burden of taxes. Taxes imposed but not collected!!

There is a wide difference between release from payment and appropriation. One is exemption—the other is not. If section 13, article 12 of the Constitution of 1869 meant, as held in the first or last view of it, the claim of appellants must fail. By the late view the exemption was void, and by the other it was subject to any regulation by the State, and, it declared that any exercise of corporate franchise after adoption of Constitution of 1890 should subject to the provisions of that Constitution, one of which is, that the property of private corporations for pecuniary gain shall be taxed.

The ingenious effort to have the 21st section of the charter of the Mobile & Northwestern Railroad Company characterized as an irrepealable contract, or as an appropriation, and not as an exemption from taxes, must fail. Its character was distinctly fixed before the Louisville, New Orleans & Texas Railway Company came into being, by *Mississippi Mills v. Cook*, 56 *Miss.* 40 If it had not been, there can not be a doubt about it. The perusal of the section suggests indirection, evasion and effort to avoid some difficulty. A stranger to the Constitution of Mississippi (that of 1869) would, on reading this 21st section, wonder why such circuity, in order to relieve from payment of taxes. No plausible explanation can be given except that it was an effort to avoid section 13, article 12, of the Constitution then in force. "The substance and not the shadow must determine the validity of the exercise of power," 155 U. S. 698, and the substance of the 21st section was certainly to relieve from payment of taxes, and no one cares for taxes never to be paid. Such a levy is a mere shadow, and not of substance—freedom from its burden. There was to be assessment, and pretense of payment —a subterfuge and sham. If the exemption was never valid, that is an end of controversy. If valid, it was lost by act of the

company in voluntarily exercising a corporate franchise it had, after the adoption of the Constitution of 1890, which in section 180 declares "All existing charters or *grants of corporate franchise* under which organizations have not in good faith taken place at the adoption of this Constitution shall be subject to the provisions of this article." Then section 181 (that article), is,

"The property of all private corporations for pecuniary gain shall be taxed," etc.

If there had been no exercise of the grant of the corporate franchise to consolidate, any exemption from taxation possessed would have continued by virtue of section 181. Plaintiffs in error invoke this provision as securing continuance of the "*exemption from taxation*," and yet deny that the immunity claimed is "exemption from taxation." If it is not that, the language of section 181 of the Constitution as to continuance does not apply, and no benefit results from it.

The several grounds of error specially assigned, though numerous, are resolvable (apart from those relating to the practice of the State Courts) into the complaint of a violation of the charter rights of the railroad companies, protected, it is claimed, by the Constitution of the United States.

The decision of the question thus raised involves principles so familiar to this Court as to relieve from the necessity of citing the cases.

It is certainly settled by the decisions of this Court, if anything can be thus settled, that the grant of power to consolidate is revocable at any time before its exercise, and, if revocable, *a fortiori*, may it be made so as a consequence of some act of the company possessing it; and the exercise of the power may be conditioned on certain consequences of the voluntary action of its possessor.

Here was no revocation of the power to consolidate, but its future exercise was made to cause a certain effect.

Late decisions of this Court vindicate the Constitution of Mississippi, adopted in 1890, from the reproach of violating the Constitution of the United States, and maintain the decision of the Supreme Court of Mississippi in this case.

This Court should not entertain the federal question—

1. Because not presented in time, not being brought up, in any way, until after the decision of the case by the Supreme Court.

2. Because the decision of the Supreme Court of Mississippi rests on a non-federal question, viz.: The interpretation of the Constitution and laws of Mississippi quite sufficient to sustain the decision.

Turner v. Commissioners of Wilkes Co., 173 U. S. 461.

3. But, if this Court shall review the decision, it should be affirmed. Because there is nothing in the federal question, raised after the Supreme Court of Mississippi had decided the case on the first appeal, and had settled the principles governing it in its further progress. That question in its full scope is, whether the history of legislative and judicial view, as set forth, is sufficient to secure the companies against the consequences of consolidation after the Constitution of 1890; in other words, whether the federal Constitution prohibited the State from providing, in its organic law, that corporate franchises not exercised before, and exercised after its operation, should subject the company to the operation of that Constitution, and this is too well set led in favor of the State's action for dispute.

If it was allowable for the State to provide in its Constitution, as it did, it is for the State Court to interpret and apply its Constitution, and this Court will regard its decision. If it is for the State Court to interpret its Constitution, this Court will not review its action, and consider whether its view is right or wrong, for, if a matter for the State Court, it is not one for this Court. So that really the precise question is, as to the validity of the provision of the State Constitution, held by the State Court to have had the effect of operating on the action of the companies in consolidating or merging, in the exercise of a corporate franchise, to deprive of the immunity claimed. To state the case is to decide it, if it may be assumed that this Court will stand by its repeated utterances.

The legislation of the State as to "back taxes," and the creation of an agent to collect them, and provisions for assessing them, are unexceptionable, and complaint of them is idle.

But if this Court shall review the decision of the State Court, I confidently appeal to the opinion of that Court as a vindication of its decision. And, if this Court shall consider the question of the right of the company to exemption from paying taxes as an original question, it should hold either that it never had any right to the exemption, because of want of power in the Legislature to grant it, being, as held by the present Supreme Court of Mississippi and this Court, prohibited by Sec. 13, Art. 12, Mississippi Constitution of 1869: and, if the immunity was possessed, being lost by consolidation, by express provision of the charter authorizing it, as well as by the exercise of the corporate franchise to consolidate after the Constitution of 1890, the effect of which was to subject the company to the provisions of that Constitution, one of which is that "the property of all private corporations for pecuniary gain shall be taxed."

The consolidation caused the loss of the exemption, if any, by express provision of the charter authorizing it. The Yazoo & Mississippi Valley R. R. Co. was chartered February 17, 1882, Acts, p. 838, (which was before the L. N. O. & T. Co. was made possible), and was by section 5 of its charter empowered, among other things, to consolidate with any other company, and the effect of its consolidation was declared to be that "the consolidated company shall have and enjoy all the property, rights, privileges, powers, liberties and immunities and franchises *herein granted*, but," etc. The exception was of a special exemption conditionally had by the Y. & M. V. Co.

The sixteenth section of the charter of the M. & V. R. R. Co., one of the components of the L. N. O. & T. Co., conferred on it the power "to consolidate the stock, property and franchises of the road with any other road or roads, in or out of this State, at any time that the president and directors of the road may deem proper, and upon such terms as may be *consistent with the powers conferred upon said company.*"

Sec. 25 of the charter of the N. O., B. R., V. & M. Co., another constituent, gave it authority "to purchase and hold any connecting railroad, and operate the same, or to consolidate the company with any other (such?) company, under the name of one or both; but, when such purchase is made or consolidation is effected, the *said* company shall be entitled to all the benefits, rights, fran-

chises, lands and property of every description, belonging to said road or roads so sold or consolidated."

It seems clear that the powers conferred on the respective companies by sections 16 and 25 did *not survive* their exercise in the formation of the L. N. O. & T. Co., but were thereby exhausted, and that the new company formed by the exercise of these powers did *not possess them.* The new company, made by consolidation, succeeded to all their respective rights and powers, *as to the road acquired from each.* It stood to each road just as the constituent companies did, and with its charter, as to the road it had, but consolidation did not invest the company with the rights and powers of each charter of the constituents, *as to the other roads.* There was not a transfer by the consolidation of the charter of one company, so as to apply to the other, and each to the whole of the consolidated road—no commingling of charters, but a vesting in the company authorized of the powers and rights of each component, *as to the road got of it*, so as to make one continuous road of several before disconnected. Hence, the right of the L. N. O. & T. Co. to consolidate, if it had it, was confined to such exercise of power, in that respect, as was conferred by section 16 of the charter of the Memphis & Vicksburg Railroad Company *as to the road got of it*, and by Sec. 25 of the N. O., B. R. & V. & M.'s charter, *as to the road got of it*—that is, it could consolidate the road obtained from each, as empowered by its charter made part of the consolidated charter. *There is no specific grant to the L. N. O. & T. Ry. Co. of power to consolidate, or otherwise dispose of itself.* It was to have all its constituents had, but the effect of this was to make it the successor, in ownership, rights and immunities, of each of the companies forming it, *as to the road acquired from it*, and not to invest the new company with greater or different power from that had by the formerly existing companies—to give the new creation, *as to each road*, exactly what the former company had; no more, no less.

That the first section of the act of March 3, 1882, which made possible the L. N. O. & R. Ry. Co., exhausted itself in the formation of the consolidated company, is *not denied. The truth is the L. N. O. & T. Ry. Co. was an end—an ultimatum aimed to be accomplished, and there is no provision looking beyond it, or contemplating its abandonment, or dis-*

solution, or merger. Its birth was provided for, but the pro-creation of its kind was not.

It is not conceivable that power was given to the companies to unite, and thus create a new company, with power in it to again consolidate, and unite with any other company and so on *ad finitum*, still acquiring exemptions and other immunities, possessed of the continuing power to acquire, and by the acquisition to receive, until the result would be colossal in the combination made by selection and union. A juster view is that the L. N. O. & T. Ry. Co., formed by the authorized union of other companies, got all the constituents had, in the way of property and powers necessary to a complete union, and formation of the new company, but the power to further consolidate was not given to the new company, and was exhausted, and *functus officio.* The charters of the uniting companies were to be taken as part of the act authorizing the consolidation, *to the end*, that the company so formed should have all possessed by the constituents necessary to its existence, and enjoyment as a corporation born of the union, but not to go on indefinitely acquiring, enlarging, etc. All that was necessary to its being accrued to the L. N. O. & T. Ry. Co. from the charters of its constituents, but no power to *dispose of or destroy itself*, was given it. *Power was given the constituents to create it, but none was imparted to it to further consolidate or unite with any other.* But, if the L. N. O. & T. Ry. Co. had any power of this sort, it arose from sec. 16 of the charter of the Memphis & Vicksburg Railroad Company, one constituent, and that applied only to the road it contributed in the consolidation, and did not extend to all the road of the L. N. O. & T. Ry. Co.

10 Howard U. S. 376; 15 Wallace 460.

And if it had power to act under sec. 25 of the charter of the other constituents, that was, *to continue to exist*, and buy, hold and operate *connecting* roads, or to consolidate with any (such?) road, and thereby acquire, use and enjoy all benefits etc. of the road sold to it, or consolidated with it. This sec. 25 contemplated the continued existence of the company, else how could it acquire, use and enjoy? It is not true that the words, "*the said company*," sec. 25, *supra*, relate to a company to be formed by consolidation, but the grammar and sense alike require the application of these words to the company empowered to buy or

consolidate, and *it* is, by a sale to it, or consolidation with it, to become entitled etc., as declared in said section. Either this is true, or the company had power by consolidation to impart all it had, and this is preposterous. The Y. & M. V. Road was not a connecting road with N. O. B. R. & V. & M., one of the constituents, and consolidation could not take place by virtue of that.

The power conferred by sec. 16 of the charter of Memphis & Vicksburg R. R. Co. was "to consolidate stock etc., upon such terms as may be consistent with the powers conferred upon said company." The power conferred by sec. 25 of the charter of the N. O., B. R., V. & M. R. R. Co. was to purchase and operate *connecting* roads, or to consolidate, *and draw to itself*, by purchase or consolidation; which required its continued existence. If the L. N. O. & T. Ry. Co. had, by charters of its constituents, any power to consolidate, it was by sec. 16 of the charter of M. & V. R. R. Co. as to the road got from it, and by sec. 25 of the charter of the other constituent, as to the road got from it, and did not have any other power, in this respect. *It did not act under this power, manifestly.* It could not by sec. 25, because the N. O. & B. R. road and Y. & M. V. were not *connecting* roads. For what are connecting roads, see 161 U. S. 677 and cases cited. It was by virtue of the ample power conferred by the charter of the Y. &. M. V. R. R. Co., that the consolidation of the L. N. O. & T. Ry. Co. was authorized, and effected, and the consequence of such consolidation must be determined by the charter authorizing it, for the question is as to the legislative will in the matter, and its expression is found in that charter. Its provision is, "the consolidated company shall have and enjoy all the property, rights, privileges, powers, liberties and immunities and franchises *herein granted*," etc, thus carefully providing that the charter of the Y. & M. V. R. R. Co. should be the measure of the enjoyment of power by the consolidated company. The purpose of this is made plain by the further provision, that in case of a lease, which is authorized, the lessee shall enjoy the rights of the lessor—that is, if the Y. & M. V. R. R. Co. should be the lessor its right should be enjoyed by the lessee, and, if it should be lessee, it should have, as far as could be, all the rights of the lessor, but, in case of consolidation, (amalgamation, complete union), the rights *herein granted*

should be those of the creation. This result followed consolidation with the Y. & M. V. R. R. Co., even, if the charter of the L. N. O. & T. Ry. Co authorized it, for such is the express provision of the charter of the Y. & M. V. R. R. Co., and whatever might have been the effect of consolidation of the L. N. O. & T. Ry. Co. with any other company, its union with the Y. & M. V. R. R. Co. was subject to the express provision of its charter. "*Herein granted.*" *Expressio unius, exclusio alterius.*

If the L. N. O. & T. Ry. Co. had an immunity from taxation in 1892, it might have retained it, by continuing to exist. It lost its existence in the consolidation forming the Y. & M. V. R. R. Co., and in surrendering its existence, and organization and name and all it had to the new company, the Y. & M. V. R. R. Co., it surrendered all that pertained to it. The grant of immunity from taxation is a personal privilege. No act of the legislature authorized the transfer of this immunity to another organization. It would not have passed by a sale. If a new Company was formed, exemption was gone, and, if as contended by opposing counsel, the Y. & M. V. Co. was enlarged, and extended by the absorption of the other, the charter of the Y. & M. V. R. R. Co., became the law of the being of the organization, for so it is declared. It acquired the property of the L. N. O. & T. Ry. Co., with its rights and powers as to such property essential to its enjoyment of it, and the charter of the Yazoo & Miss. V. R. R. Co. became henceforth the measure of its powers and rights and incidents as a consolidated company. Extensive powers were conferred on it, and a roving commission for universal consolidation, with the declaration that its charter should be the fundamental law of the consolidated company. The state consented for the Y. & M. V. R. R. Co. to take in another Company, and said, in giving such consent, that the consolidated Company should have what was granted by that charter, not what was granted by another, without or within this state, for the power to consolidate extended to charters granted by other states; and the Y. & M. V. R. R. Co. having absorbed the L. N. O. & T. Ry. Co., with all its belongings, can not claim any special immunity, except as conferred by its own charter. The L. N. O. & T. Ry. Co. can not, and does not claim anything, for it *does not exist.* If power to consolidate was in both char-

ters, but with different terms as the effect of consolidation, that most favorable to the state would prevail. In none of the provisions as to consolidation is there a declaration that continued exemption from taxation shall be incident to consolidation, but rather an indication of purpose to guard against that. The authority to agree on terms has no reference to preserving immunity from taxation by agreement, of course, for that would be ridiculous. It refers to other matters, such as stipulating for the respective rights, and status of the contracting parties.

The clause in the 5th sec. of the charter of the Y. & M. V. R. R. Co., "nor of exempting from taxation any property which the consolidated company may after such consolidation acquire under the provisions of the charter of such other consolidating company," was put in merely out of abundant caution, to guard against getting exemption from taxation, and is valueless as an indication of legislative purpose as to the effect of consolidation. It is merely negative, and has no office, except exclusion, and shows legislative purpose to deny exemption from taxation. As the right of the Company to consolidate was universal and unrestricted, it was deemed proper to guard against any claim of exemption from taxation in the manner mentioned. This was perhaps necessary to satisfy the Legislature, and obtain the extraordinary charter.

Granting that in case of a lease by the Y. & M. V. R. R. Co. it would have got the road leased with its immunities, that is no answer to the proposition, that, as the charter is written, it plainly provides that the effect of consolidation shall be to give the consolidated company the rights, etc., *herein granted*. Why the difference is immaterial, for this was a *consolidation*, and not a lease, and, if the railroad lawyer who wrote the charter so expressed it as to produce different consequences in the two conditions, that does not concern us. The charter was drawn for a purpose, and the provision that consolidation was not to give exemption from taxes, was intended to capture the Legislature, and doubtless had that effect. Being the work of the promoters, it must be taken most strongly against the corporation. The provision as to non-exemption of property acquired in future under the *other* charter has reference to the acquisition by eminent demain or other means of what was essential or convenient

to the operation of the road acquired by consolidation, as to which fundamental right, from necessary implication, the charter of the *other* Company was to continue in favor of Y. & M. V. R. R. Co., so it could enjoy what it acquired by consolidation. Whatever meaning may be attached to the clause of Sec. 5 of the charter of the Y. & M. V. R. R. Co. relied on as showing the legislative purpose to keep in force charters of consolidated companies, it is certain that the Legislature declared that the consolidated company should have what is "*herein granted*," which made this charter the exponent of the rights of the consolidated company. The fact that a declaration was made against any possible claim of certain exemption from taxation can not nullify the express declaration that was made specifically on the subject of the rights of the consolidated company. It should be remembered, that the charter was mainly the work of those interested in procuring the very *extensive* powers granted, and the purpose was to secure to the company, in its enlarged dimensions, the extensive grant of privileges contained in the charter. If now it operates in a way not designed, no complaint should be made. A multitude of words were employed promiscuously in the charter, but an explicit declaration was made as to what is "*herein granted*" being the measure of the rights of the consolidated company, and the exemption claimed is not among them.

The attempt of the consolidating companies to avoid the effect of the consolidation by their agreement can have no effect. They had the right to agree on terms, but could not vary the legal consequence of what they did, by any declaration or agreement. The law determines that.

The L., N. O. & T. Ry Co. went out of existence, lost itself and belongings in the new company, the Y. & M. V. R. R., and that alone owns, and represents, and stands for what was once the L. N. O. & T. Ry Co., and the rights and privileges granted by its charter ("*herein granted*") are all it can claim; and surely they are enough, for perusal of the charter will show a most extraordinary aggregation of powers, and will account for the *studied purpose* of the draftsman of the charter to make that the measure of the powers and privileges of the consolidated company.

THE EFFECT OF CONSOLIDATION UNDER THE CONSTITUTION OF 1890.

By sec. 180 of the Constitution of 1890, it is declared, that all existing charters or *grants of corporate franchise*, under which organizations have not in good faith taken place, at the adoption of this constitution shall be subject to the provisions of this article, among which is sec. 181 declaring that "The property of all private corporations for pecuniary gain shall be taxed, etc." (Existing exemptions to continue in force unless sooner repealed.) The power to consolidate is a corporate franchise, and where it was not exercised so as to effect organization before the adoption of the constitution, its subsequent exercise was subject to the provision for the taxation of all the property of private corporations for pecuniary gain, in view of which there can not be an exemption of the property of such corporations, except when like exemption is extended to individuals.

Thompson Corp. sec. 365; 112 *U. S.* 609; 113 *Id.* 465; 109 *Id.* 244; 152 *Id.* 301.

The constitution preserved the *status quo* of existing exemptions, but does not apply to exemption in a new organization effected by the exercise of a corporate franchise, *after* the adoption of the constitution. The purpose of the constitution was to leave existing exemptions to be dealt with by the legislature, and, if the L. N. O. & T. Ry Co. had continued in being, and the exercise of its rights, the exemption, if it existed, would have been unaffected, but as it was consolidated with the V & M. V. R. R. Co., and surrendered its existence, in pursuance of a corporate franchise, the organization resulting was subject to the provision that the property shall be taxed.

Keokuk v. Missouri, 152 *U. S.* 301; 161 *U. S.* 646-677.

Whatever the union of the companies was, it was certainly an organization in the exercise of a corporate franchise, and subjected to the operation of the provisions of the constitution of 1890 on that subject.

Sec. 279 of the constitution can have no influence in this case. It was wholly unnecessary—is a mere platitude, and could not serve any purpose, except as declarative of what was

true without it, viz: that the adoption of the constitution did not affect the status of existing claims as mentioned. It means this and no more; that the substitution of the new for the old constitution shall not *ipso facto* disturb the *status quo* under the old. *It did not in any way abrogate or qualify any of the specific provisions of the new constitution.*

F. A. Conty,
R. C. Becket
of Counsel for Defts. in Error
with J. D. P. Campbell.